IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

FIRST APPEAL NO. 1261 OF 1988.

1. Smt.Godavati w/o.Mohanlal Patel.
2. Hansa Mohanlal Patel.
3. Meenaxi Mohanlal Patel.
4. Bharati Mohanlal Patel.
5. Ashok Mohanlal Patel.
6. Anil Mohanlal Patel. ... Appellants.

Versus.

1. Jayantilal Dwarkadas Shah.
2. Abdul Bujaragkhan.
3. United India Insurance Co.Ltd. ... Respondents.

Shri N.L.Gada for the Appellants.

Shri Prakash R.Gyani for the Respondent No.1.

Shri H.H.Trivedi for the Respondent No.3.

CORAM : ABHAY S. OKA, J.

DATED : 28th March, 2006.

ORAL JUDGMENT.

1. Submissions of the learned Advocates appearing for the parties were heard yesterday. Today the Appeal is kept for dictation of judgment. The Appellants are the original Plaintiffs and the Respondents are the original Defendants.

2. According to the case of the Appellants, the husband of the Appellant No.1 late Mohanlal Nanji Patel was travelling in his car bearing No.BMC-5951 from

Ghatkopar to Veraval in Gujarat State along with six workers. This was on 26th August 1976. According to the case of the Appellants, at that time, a truck bearing registration No.MRL-2081 which was coming from opposite direction dashed against the car by crossing the dividing line of the road. The husband of the Appellant No.1 died on the spot. Respondent No.1 herein is the owner of the truck. At the relevant time the Respondent No.2 was driving the truck. Respondent No.3 is the Insurance Company with whom the truck was validly insured on the date of the accident.

3. The suit was contested by the Respondent No.1 by filing written statement. It was contended that the driver of the motor car was negligent and in fact Respondent No.2 was driving the truck in a careful manner in a moderate speed and the motor car of the deceased was being driven in a rash and negligent manner and the car dashed against the truck. The Respondent No.3 also filed written statement and contended that the liability of the Respondent No.3 was limited to Rs.50,000/- in one incident in accordance with section 95(2)(b) of the Motor Vehicles Act 1939. The learned trial Judge held that both the deceased and the Respondent No.2 are negligent as a result of which the accident had taken place and has recorded a finding of

contributory negligence on the part of the deceased. The learned Judge decreed the suit in the sum of Rs.50,000/- and directed Respondent No.3 to pay the same within a period of 30 days as a defence was raised that the liability of the Insurance Company under the Policy was restricted only Rs.50,000/-.

4. The learned Counsel appearing for the Appellant has taken me through the notes of evidence. He submitted that the driver of the truck has not stepped into the witness box and therefore, the learned Judge could not have recorded a finding of contributory negligence against the deceased. He invited my attention to the spot panchanama which is duly admitted in evidence at Exh.118 and submitted that the spot panchanama shows that the car was on its correct side and it is the truck driven by the Respondent No.2 which came on its wrong side. He submitted that on the plain reading of the insurance policy of the truck, it is seen that the liability of the Insurance Company was unlimited. The learned Counsel appearing for the Respondent No.1 supported the finding of the learned Tribunal so far as the contributory negligence is concerned. He submitted that it is very clear that the liability of the insurance company under the policy is unlimited. He pointed out the prescribed tariff and

submitted that the insurance premium for covering unlimited liability was paid by the Respondent No.1. The learned Counsel appearing for the Respondent No.3-Insurance Company also supported the impugned Judgment and order and pointed out that the liability of the insurance company was restricted to Rs.50,000/-.

5. I have considered the rival submissions. There is no dispute about the involvement of the truck owned by Respondent No.1 in the accident. The widow of the deceased was examined who deposed that the age of her husband at the time of death was 40 years. According to her, the deceased was earning Rs.20,000/- to Rs.25,000/- per year from his business as a labour contractor. She tendered in evidence a receipt showing payment of income tax which is at Exh.78.

6. The owner of the Truck i.e. the Respondent No.1 has examined himself. He stated that on the relevant day the truck was proceeding to Bombay from Baroda and it was loaded with iron scrap. He stated that when the truck came near Talasari, one car came from Bombay side. The driver of the truck gave warning by blowing horn and also light signals to the car. The car gave a dash to the truck as a result the truck had gone to the kachha road on cleaner's side. In the cross examination made

by the Appellants' Advocate, the Respondent No.1 has stated that Respondent No.2 i.e. the driver saw the car from a distance of about 100 feet. He denied correctness of the suggestion that the truck gave a dash to the car which was coming from Bombay side. A perusal of the panchanama at Exh.118 and in particular spot of impact described in panchanama shows that the accident took place on the left hand side of the road in so far as the car is concerned. The spot of accident as reflected in the panchanama clearly shows that the at the time of impact the car was on its correct side.

7. The spot of accident shown in the panchanama assumes importances especially when the driver of the truck is not examined. In the evidence of Respondent No.1 there is no explanation as to why the driver of the truck is not examined. In fact the learned trial Judge ought to have drawn adverse inference against the Respondent No.1 for not examining the driver of the truck.

8. The finding recorded by the learned trial Judge on the relevant issues is required to be considered. Without assigning any specific reason, the learned trial Judge has held that the accident was caused on account of the contributory negligence of both the parties. The

learned Judge has not considered the spot panchanama which was admitted in evidence. The learned Judge has also not considered the effect of failure of the Respondent No.1 to examine the driver of the truck. Looking to the spot panchanama and the evidence of Respondent No.1 in which he has stated that the driver of the truck saw the car from a distance of 100 feet, the only conclusion which can be which can be arrived at is that the accident occurred due to the negligence on the part of Respondent No.2-driver.

9. Now coming to the finding regarding the quantum of compensation, it must be noted here that the widow of the deceased stated that the income of the deceased was Rs.20,000/- to Rs.25,000/- per year from the business. The only supporting document which could be produced by the Appellants in support of the claim was the document at Exh.78 which is the receipt showing the payment of Rs.332/- towards income tax for the year 1970-71. This evidence on record at the highest can establish that the deceased was a tax payer. The suggestion given to the widow in the cross-examination is that her husband was not earning Rs.2000/- per month. It is very difficult to accept that the income of the deceased at the relevant time was Rs.20,000/- to Rs.25,000/- per year from his business. Considering the fact that the

deceased was a tax payer and was carrying on business, broadly the income of the deceased can be taken at Rs.1500/- per month. It is well settled that in the matter of calculating damages payable in an accident claim some guess work is always involved. A deduction of Rs.500/- will have to be made on account of the personal expenditure. The multiplicand will be Rs.12,000/- (Rs.1000 x 12).

10. There is no clear evidence produced on record regarding the age of the deceased at the time of accident. The widow of the deceased has deposed in paragraph 2 of her deposition that the age of the deceased was 40 years at the time of the accident. Therefore, multiplier of 10 will have to be applied. The total amount thus comes to Rs.1,20,000/-. It must be noted here that the accident is of the year 1976. Therefore, conventional amount on account of loss of consortium will have to be awarded considering the fact that the accident took place in the year 1976. The said amount will be Rs.10,000/-.

11. The trial Court has not awarded any interest. Considering the fact that the Appellants have filed a civil suit, in view of section 34 of the Code of Civil Procedure, 1908, interest at the rate of 6% per annum

will have to be awarded from the date of filing of the suit till the date of payment.

12. The other question which is required to be decided is regarding the liability of the Insurance Company. The policy of the insurance is produced at Exh.114 which was issued on 14th June 1976. The said policy shows that a rubber stamp is affixed on it indicating that the liability was unlimited. On the word "unlimited" it appears that subsequently ink of the rubber stamp has been applied. One Subramhanyam Rajaram was examined on behalf of the Respondent No.3. The said witness was serving as a Senior Assistant with the Appellant-Insurance Company. He has stated in examination-in-chief that the liability was limited to Rs.50,000/-. However, in cross-examination he has stated that the word "unlimited" is legible on the policy document. He stated that the word "unlimited" is scored out by rubber stamp but it was not countersigned by any official. The learned Advocate for the Respondent No.1 has invited my attention to the schedule of motor tariff under which insurance premium is payable on commercial vehicles. The policy shows that the carrying capacity of the truck is 9-1/2 tons. The tariff shows that for a comprehensive policy of a vehicle having licenced capacity exceeding 5080 kgs.

premium payable is Rs.911/- plus 1/2% of I.E.V. plus Rs.150/- for each additional 1016 kg. or part thereof. The insurance policy shows that the basic premium of Rs.911/- and 1/2% IEV is paid. In addition to that a sum of Rs.750/- has been paid extra for the weight above 5080 kgs. at the rate of Rs.150/- for each additional 1016 kgs. Apart from this, it is obvious that the word "unlimited" has been scored out unauthorisedly from the original policy. Thus it is very difficult to accept the contention of Respondent No.3 Insurance Company that its liability was limited to Rs.50,000/-. In my view the liability of Respondent No.3 was not limited.

13. Hence the Appeal must succeed. The impugned Judgment and Decree will have to be quashed and set aside.

14. Hence the following order is passed:

i) The impugned Judgment and Decree is quashed and set aside and the same is substituted by the following operative part:

. (a) The suit is partly decreed.

. (b) The Defendants are jointly and severally ordered and decreed to pay a sum of Rs.1,30,000/- to the Plaintiffs together with simple interest at the rate of 6% per annum from the date of institution of the suit till payment. Defendants shall pay proportionate costs of the suit to the Plaintiffs."

ii) The Respondents are granted time of four months to comply with this order. If any amount is already deposited or paid by the Respondent No.3 on the basis of the impugned decree passed by the trial Court, the Respondent No.3 will be entitled to necessary adjustment.

iii) The Appellants will be entitled to proportionate costs of this Appeal.

iv) The Appeal is disposed of in the above terms.

Judge.